No. 89-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus Curiae will address the following question:

Whether Due Process requires, as a predicate to awarding substantial punitive damages against a principal, an intelligible legal standard for attributing an agent's misconduct to the principal.

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INTEREST OF THE AMICUS CURIAE [1]

The National Association of Mutual Insurance Companies ("NAMIC") consists of more than 1,200 companies that underwrite insurance of all types in every jurisdiction in the United States. Founded in 1895, NAMIC assists its members in providing a financially stable, competitive private insurance market for the consuming public.

Insurance is marketed through widely various and often remote business relationships. NAMIC members are increasingly confronted with substantial punitive dam-

[1] The parties' letters of consent to this brief have been lodged with the clerk.

ages claims based solely upon theories of vicarious attribution, similar to the claim in this case. *Amicus* believes there are valid constitutional objections where the nexus between the active tortfeasor and a principal defendant is too remote to justify imposition of substantial punitive damages by attribution.

Amicus therefore asks that the Court in this case be mindful of the serious problems resulting in unjustified attribution of substantial punitive damages, and articulate a standard in this respect that is compatible with notions of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The unfairness of unconstrained jury discretion to award punitive damages in a civil lawsuit is compounded where such damages are imposed against a principal for the wrongdoing of an agent in the absence of any intelligible legal standards for attribution. The rule of attribution applied in this case originated historically as an extension of the *respondeat superior* doctrine from a basis for compensatory damages to a predicate for punitive damages. Unfortunately, no satisfactory rationale for attribution of punitive damages has been articulated in scholarly discussion or judicial decision, including the Alabama decisions on the subject. Few courts have paused to consider the fundamental differences between compensatory and punitive damages. Until recently, the rule of attribution resulted in few punitive damages awards of any significance. The substantial increase in large punitive damages awards during the last ten years, however, warrants careful examination of this problem and the articulation of intelligible standards for attribution that comport with Due Process.

ARGUMENT

Amicus adopts petitioner's argument that Due Process prohibits the imposition of substantial punitive damages in the absence of standards or limits governing the discretion of the decisionmaker, judge or jury. This unfairness is compounded where such damages are imposed against a principal in the absence of any intelligible standards for attribution of an agent's misconduct.

I. IMPOSITION OF SUBSTANTIAL PUNITIVE DAMAGES BY ATTRIBUTION—FOR EXAMPLE ATTRIBUTION TO A CORPORATION OF AN EMPLOYEE'S CONDUCT—IS A RECENT PHENOMENON.

While legal historians differ on the origins of vicarious liability in Anglo-American law, *see* Harper, James & Gray, The Law of Torts, § 26.2 (2nd ed. 1986); Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105 (1916); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 383 (1894); Holmes, *Agency*, 4 Harv. L. Rev. 345 (1891), it is generally accepted that until the Sixteenth Century a master was not liable for a servant's tort unless the master authorized the wrongful act. Prosser, Handbook of the Law of Torts, § 2 (4th ed. 1971).

By 1800, Lord Kenyon held that while a servant's negligence within the course of employment could be attributed to the master for compensatory liability, the master could not be liable for punitive damages (trespass) where the servant wilfully disobeyed the master's orders. *McManus v. Crickett*, 1 East. 105, 102 Eng. Rep. 43 (1800). Modern-day vicarious liability is rooted in the policy of compensating victims for torts committed by servants in the course of their masters' employment. Although its legal rationale is still arguable, *see* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal.L. Rev. 1 (1982), vicarious liability for *compensatory* damages is now uniformly accepted. Keeton, Dobbs, Keeton

& Owen, Prosser & Keeton on The Law of Torts, pp. 499-508 (5th ed. 1984). *See also*, Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L.Rev. 563 (1988).

During the late Nineteenth Century, many American jurisdictions extended the rule of attribution to impose *punitive* damages upon principals for tortious misconduct of agents or employees. Few courts paused to consider the distinction between compensatory and punitive damages, or the policy considerations that could justify punitive damages. No fully satisfactory rationale for vicarious attribution of punitive damages has been articulated in judicial or scholarly discussion. *See, e.g.*, Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala.L.Rev. 975, 980 (1989); Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala.L.Rev. 1053, 1068 (1989); Parlee, *Vicarious Liability for Punitive Damages: Suggested Changes in the Law Through Policy Analysis*, 68 Marq. L. Rev. 27, 28 (1984); Priest, *Punitive Damages and Enterprise Liability*, 56 So.Cal. L.Rev. 123, 123-24 (1982); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1257, 1299-1301 (1976); Comment, *Corporate Vicarious Liability for Punitive Damages*, 1985 B.Y.U.L.Rev. 317, 318 (1985). *Cf.* Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 Harv.L.Rev. 1227, 1247-51 (1979).

The want of a satisfactory rationale may explain the sharp division among American jurisdictions over the proper standard for attribution. Some states have simply extended the *respondeat superior* rule to encompass punitive damages for tortious acts committed by employees in the course of their employment, making no distinction between compensatory and punitive damages in attributing liability to the principal. The degree of a principal's involvement is immaterial. Other jurisdictions, now constituting a majority,[2] follow the "complicity" rule formulated by the American Law Institute. *See* Restatement (Second) of Torts § 909 (1977).[3] Under that rule, attribution of punitive damages is limited to torts committed, authorized or ratified by a "managerial agent," or torts committed by an unfit employee who was recklessly employed or retained. *Accord* Restatement (Second) of Agency § 217 C (1958); Model Penal Code § 2.07(1) (1985).

In the federal sphere, this Court adopted the complicity rule in *Lake Shore & S.M. Ry. Co. v. Prentice*, 147 U.S. 101 (1893), wherein it stated:

> Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court

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[2] *See* Comment, *Corporate Vicarious Liability for Punitive Damages*, 1985 B.Y.U.L.Rev. 317, 318 (1985) (showing the number of states adhering to each rule). *Accord*, Ghiardi & Kircher, Punitive Damages Law and Practice § 24.01 at 2 (1985).

[3] Section 909. Punitive Damages Against a Principal

Punitive damages may properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

in the case of *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818).

147 U.S. at 107. The Court in *Lake Shore* further noted that a corporation may be punished for the acts of an agent only where "criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation." *Id.* at 111.

The Court later explained its *Lake Shore* holding as merely adopting the rule of attribution "which it thought most appropriate" and not necessarily establishing a Due Process limitation. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 115 (1927). The Court has questioned *Lake Shore* in a footnote in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982), but did not overrule it. In *Hydrolevel* the Court upheld a statutory antitrust award of treble damages attributed to a principal under a theory of "apparent authority." The Court recognized the treble damages as having a remedial component designed to counterbalance the "difficulty of maintaining a private suit," and not serving a solely punitive purpose. *Id.* at 575. The decision in *Hydrolevel* therefore is consistent with the complicity rule adopted in *Lake Shore*.[4]

In Alabama, the rule of *respondeat superior* was judicially enlarged near the turn of this century to allow the recovery of punitive as well as compensatory damages. *See Case v. Hulsebush*, 122 Ala. 212, 26 So. 155 (1899); *Avondale Mills v. Bryant*, 10 Ala.App. 507, 63 So. 932 (1913). As in other states, the Alabama Supreme Court appears never to have analyzed the differences between compensatory and punitive damages in connec-

[4] The complicity rule likewise has been embraced by several federal courts of appeals. *See Williams v. City of New York*, 508 F.2d 356 (2nd Cir. 1974); *Bankers Life Ins. Co. v. Scurlock Oil Co.*, 447 F.2d 997 (5th Cir. 1971); *Parris v. St. Johnsbury Trucking Co.*, 395 F.2d 543 (2nd Cir. 1968); *Roginsky v. Richardson-Merrill*, 378 F.2d 832 (2nd Cir. 1967).

tion with a rule of attribution, nor has it defined any standard of attribution except for the vague requirement that the agent's tort be committed "within the scope of his employment." 63 So. at 934. The most recent statement is found in *HealthAmerica et al. v. Menton*, 551 So.2d 235 (Ala. 1989), where the court in affirming $1.8 million in punitive damages stated simply, "A corporation is responsible for the acts of its agent." *Id.* at 245-46. As will be shown below, the operative rule of attribution in Alabama civil cases has become "let the jury decide," without sufficient instruction for the factfinder in legal standards for determining whether the principal should be punished.[5]

Until a decade ago, Alabama's rule of attribution resulted in a few punitive damages awards of any significance. Since then, several substantial punitive damages awards have been imposed against insurance companies based solely on grounds of *respondeat superior*. *See, e.g., Land & Assoc., Inc. v. Simmons*, [1989 WL 162213] —— So.2d —— (Ala. 1989) ($2.5 million); *HealthAmerica, et al. v. Menton*, 551 So.2d 235 (Ala. 1989) ($1.8 million); *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985) ($3 million); *National Sec. Fire & Cas. Co. v. Bowen*, 447 So.2d 133 (Ala. 1983) ($1.5 million). The recent proliferating phenomenon of substantial punitive damages awards, based upon an indefinite rule of attribution, compels careful examination of this question and the articulation of a rule of attribution that comports with Due Process.

[5] Alabama applies a much stricter standard of attribution under its *criminal* law, requiring "either (1) authorization, procurement, incitation or moral encouragement, or (2) the knowledge plus acquiescence of the principal in the acts of his agent" before vicarious criminal liability may be imposed. *See State v. Spurlock*, 393 So.2d 1052, 1059 (Ala.Crim.App. 1981), citing Perkins, Criminal Law pp. 812-13 (2nd ed. 1969).

II. ATTRIBUTION OF SUBSTANTIAL PUNITIVE DAMAGES ON THE BASIS OF UNINTELLIGIBLE STANDARDS EXPOSES CORPORATIONS TO FUNDAMENTAL UNFAIRNESS.

Due Process prohibits punishment of persons not adequately shown to be guilty. *See Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 115 (1983). This protection extends to civil defendants hoping to protect their property. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Punitive damages implicates the defendant's right to fair punishment rather than plaintiff's interest in fair compensation. The unfairness of punishing a principal for its agent's misconduct is made more acute where, as in this case, the wrong is committed solely for the agent's illicit benefit. A meaningful nexus must be required between the defendant principal and the actual tortfeasor before the latter's misconduct may serve as the predicate for punishment, even under a liberal rule of *respondeat superior*.[6] The focus must be upon the level of corporate involvement, not solely upon the act of the "agent".

The Alabama Supreme Court has failed to come to grips with this problem. Instead of articulating intelligible standards, it has broadly declared the issue of attribution a "question . . . for the jury." *See American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657, 665 (Ala. 1985). As a result, several multi-million dollar punitive damages verdicts have been imposed by juries against insurance companies for the tortious misconduct of persons who had only remote or indirect relationships with the defendant insurer.

For example, in *National Security Fire & Cas. Co. v. Bowen*, 447 So.2d 133 (Ala. 1983), the insurance company had an agency relationship with an insurance brokerage, which independently hired two private investigators to determine the cause of a fire loss. There was no evidence of any relationship or communication between the insurance company and the investigators. After a serious of outrageous actions by the investigators, the insured sued the insurance company on theories of fraud, malicious prosecution and the tort of outrage. A jury imposed punitive damages in the amount of $1.5 million. On appeal, the Alabama Supreme Court held that the existence of an agent relationship is simply "a question of fact to be determined by the jury" and "it is quite obvious that the jury believed that a principle-agent relationship existed in this case." 447 So.2d at 138. There was no discussion of intelligible standards or whether the insurance company was guilty of any complicity in the tortious conduct.

[6] Such a nexus is explicit in the "complicity" rule, which requires that the punishable act be committed or authorized by a managerial agent.

Similarly, in *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985), a total stranger to defendant American Pioneer fraudulently induced the plaintiff to purchase an annuity from the company. The "agent" actually was a registered agent of an entirely different insurer at the time of the fraud, and it was undisputed that he did not become licensed by American Pioneer until several months later. 470 So.2d at 665. The jury returned a general verdict against American Pioneer in the sum of $3 million in punitive damages. On appeal, the Alabama Supreme Court noted that the trial court instructed the jury that it could have found the agent was merely a "broker," rather than an agent. The court then dispensed with the agency question by stating that "there was disputed evidence in the case, so the question was for the jury." *Id.*

Again, in *Continental Electric Co. v. American Employers' Insurance Co.*, 518 So.2d 83 (Ala. 1987), the Alabama Supreme Court reversed a summary judgment which the trial court had granted in favor of the in-

surer on the absence of a sufficient agency relationship. The active tortfeasor was an employee of an insurance agent, hence one step removed from a direct agency relationship. The court held there was sufficient evidence (under a "scintilla" standard) that he was a "subagent" to warrant submission to the jury of the issue of punitive damages against the insurer. The operative rule of attribution was, again, 'let the jury decide.' *Id.* at 89 ("summary judgment on this claim was improper").

In opposition to granting the writ on this issue, respondents have cited *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), where the Court held that Alabama's imposition of liability through punitive damages against an employer in a statutory wrongful death case did not violate Due Process under the Fourteenth Amendment. The *Pizitz* case, however, involved a direct master-servant relationship rather than a questionable agency relationship. More important, the Alabama wrongful death statute, although cast as a punitive remedy, is in substance a compensatory one. *See Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 11 So. 800, 801 (1892); Nettles & Latta, *Alabama's Wrongful Death Statute: A Problematic Existence*, 40 Ala. L. Rev. 475, 485-90 (1989). Where the statutory punitive damages effectuates a *compensatory* purpose, as in *Pizitz* and *Hydrolevel*, different considerations are involved in attribution than when punitive damages are imposed solely as punishment. Furthermore, *Hydrolevel* involved an express statutory limit of three-fold the compensatory damages.[7] In contrast, the Alabama law applicable in this case had neither an articulated substantive standard of attribution such as in the Restatement of Torts, nor a proportionate

[7] Plaintiff in *Pizitz* was represented by then-attorney Hugo L. Black who, perhaps not so coincidentally, later authored *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), holding that federal due process prohibits standardless jury discretion in the imposition of damages.

limitation on punitive damages such as the three-fold standard under the antitrust liability in *Hydrolevel*.

Under any rule of attribution, further unfairness results where the *amount* of punishment for an agent's misconduct is determined by reference (express or implied) to the innocent *principal*'s size and wealth. Moreover, the financial burden of the punishment ultimately falls primarily upon blameless shareholders, customers, or the public at large. *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 66 (1982). In the case of mutual insurance companies, it falls directly on the policyholders.[8] Compare *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), where the Court prohibited attribution of punitive damages against municipalities in claims under 42 U.S.C. § 1983 because of the financial burden placed upon taxpayers.

[8] Mutual insurance companies, by definition, are owned by their policyholders. *See Union Ins. Co. v. Hoge*, 62 U.S. 35, 64-65 (1859); Couch on Insurance 2d (Rev.ed) § 19:14 (1984).

CONCLUSION

There appears to have been no intelligible standard of attribution applied in the present case, judging from the report of the opinion below. This Court should require, as a matter of Due Process, the articulation of an intelligible legal standard for attribution of an agent's misconduct as a predicate to awarding substantial punitive damages against a principal.

Respectfully submitted,

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